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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

No. 435

DART DRUG CORPORATION OF MARYLAND, and PEOPLES SERVICE DRUG STORES, INC.,

*Appellants,*

v.

ELLIS GADOL and SELMA GADOL, co-partners doing business as FOUR CORNERS PHARMACY,

*Appellees.*

## JURISDICTIONAL STATEMENT

MILTON M. GOTTESMAN
Wyatt Building
Washington 5, D. C.
*Attorney for Appellants*

*Of Counsel:*
J. E. BINDEMAN
Wyatt Building
Washington 5, D. C.

WILLIAM B. KEMPTON
BARTON, WILMER, BRAMBLE & PENNIMAN
Mercantile Trust Building
Baltimore 2, Maryland

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

ELLIS GADOL and SELMA GADOL, co-partners doing business as FOUR CORNERS PHARMACY,

*Appellees.*

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## JURISDICTIONAL STATEMENT

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This is an appeal from a judgment of the Court of Appeals of Maryland, reversing a decision of the Maryland Circuit Court for Montgomery County and directing the issuance of a permanent injunction against the appellants under the Maryland Fair Trade Act.

### OPINIONS BELOW

The Opinion of the Court of Appeals, rendered on May 13, 1960, is reported at 161 A. 2d 122. That decision and the Opinion and Order of the Maryland Circuit Court for Montgomery County are printed as Appendix A hereto (*infra*, p. 1a).

## JURISDICTION

Appellees instituted this suit on July 17, 1958, in the Circuit Court of Montgomery County, Maryland, pursuant to the Fair Trade Act of Maryland, Article 83 §§ 102-110 of the 1957 Code of Laws of Maryland, to enjoin appellants from selling pharmaceutical products at less than the minimum retail resale prices stipulated by four manufacturers, none of whom were party to the suit. The judgment of the Court of Appeals of Maryland reversing the decision of the Circuit Court for Montgomery County and granting the requested injunction, was entered on May 13, 1960, and its order denying appellants' Motion for Reargument was filed on June 29, 1960. Appellants' Notice of Appeal was filed with the Clerk of the Court of Appeals of Maryland on July 26, 1960. The jurisdiction of this court to review the judgment below is conferred by Title 28, U.S. Code, § 1257(2). This jurisdiction is believed to be sustained by *Winters* v. *New York*, 333 U.S. 507 and *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408.

## STATUTES INVOLVED

This appeal involves the constitutionality of "the non-signer clause" of the Maryland Fair Trade Act, Article 83, § 107 of the 1957 Code of Laws of Maryland, and Section 5 of the Federal Trade Commission Act as amended, 15 U.S.C. § 45, Act of July 14, 1952, c. 745, 66 Stat. 632, known as the McGuire Act. The text of both laws is set out in Appendix B hereto.

## QUESTIONS PRESENTED

1. Is the loss of business by a non-signing retailer as the result of price cutting by a competing non-signing retailer in violation of minimum prices fixed by manufacturers under authority of a state Fair Trade Act and the McGuire Amendment to the federal antitrust laws, actionable damage within the meaning of those statutes?

2. Where the highest court of a state construes a state Fair Trade Act so as to give such a retailer the right to protection against such price cutting by his competitor whether or not the manufacturer chooses to bring suit, does it not constitute a violation of the Fourteenth Amendment to the Constitution of the United States?

## STATEMENT OF THE CASE

This is an action brought by appellees, the proprietors of a retail drug store in Silver Spring, Maryland (hereinafter referred to as plaintiff) to enjoin the appellants, two competing retail drug stores in the same vicinity (hereinafter referred to as defendants) from selling branded products at less than the minimum retail resale prices established by four manufacturers of drug and cosmetic products under the Maryland Fair Trade Act (*infra*, p. 18a). That Act authorizes manufacturers of branded merchandise to establish minimum resale prices for such merchandise by contracts with one or more customers and to make such resale prices binding on all customers, whether or not they are parties to such contract. None of the parties to this case signed such a contract.

The manufacturers of the articles whose sale was enjoined by the court below, were Miles Laboratories, Inc., Bristol-Meyers Co., Mead-Johnson Co., and Johnson & Johnson. None of them joined in this action and none of them brought an independent action to enjoin the alleged violations of the minimum prices in question.

The defendants admitted the advertising and sale of the products in question at prices below the minimum retail resale prices set by the manufacturers, but they maintained that the plaintiff had no standing to bring this action for two principal reasons: (1) The manufacturers themselves had failed diligently to enforce their rights under the statute; and (2) the plaintiff as a retailer in

competition with the defendants, had no right to enjoin the alleged price cutting by the defendants.

The defense that the construction of the Maryland Fair Trade Act sought by the plaintiff and made by the court below, conflicts with the Fourteenth Amendment to the United States Constitution was interposed by paragraph 20 of the Answer of defendant Dart (R. 23) and paragraph 17 of the Answer of defendant Peoples (R. 19) to the plaintiff's Complaint in the Circuit Court.

The evidence adduced at the trial showed that the manufacturers of the articles in question had been "passive and indifferent" toward enforcement of their minimum retail prices in this area (p. 14a) and that it was only because of the manufacturers' failure to do anything about such price cutting that the plaintiff retailer brought this suit. The trial court held that if these four manufacturers had acted with reasonable diligence, they would have brought this suit themselves and the plaintiff non-signing retailer would have had no need to do so. It therefore denied plaintiff's prayer for an injunction and it dissolved the interlocutory injunction which it had previously granted.

On appeal, the Court of Appeals agreed with the Circuit Court that these manufacturers "were certainly not over-zealous in policing prices in the Washington-suburban area" and that the Gadols "brought this suit themselves because the manufacturers would not bring suit" (p. 8a); but it held that Article 83, § 107 of the Maryland Fair Trade Act created a cause of action for the protection of a competing retailer from price cutting of this sort whether or not the manufacturer or manufacturers involved chose to sue. It therefore reversed the decision of the trial court and remanded the case for the issuance of the permanent injunction sought by the plaintiff against its conipetitors.

On June 10, 1960, both defendants filed Motions for Reargument which reiterated their defense that as applied

by the Court of Appeals, the Fair Trade Act violated the Fourteenth Amendment (R. 272A and R. 283). On June 29, 1960, the Court of Appeals denied these Motions, but it granted a stay of its mandate to permit the defendants to apply to this court for review of its decision.

## THE FEDERAL QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL

In the twenty-five years since this court first upheld the validity of state Fair Trade legislation, this is the first time, we believe, that it has been called upon to decide whether a state, consistent with the federal antitrust laws and the Constitution of the United States, can confer upon a non-signing retailer the power to police his competitors' adherence to so-called Fair Trade prices established pursuant to state legislation authorized by Congress in the McGuire Act. While it is clear that Congress intended in that Act to subject non-signing retailers to the obligations imposed by state Fair Trade laws, nothing in the Act suggests that it intended to create a cause of action to protect such retailers.

### 1. The loss of business by a non-signing retailer as the result of price cutting by a competing retailer in violation of minimum prices established under authority of the Maryland Fair Trade Act and the McGuire Act is not actionable damage within the meaning of those statutes.

#### a. The Fair Trade Act.

The mere fact that such a retailer has lost business as the result of his competitior's statutory violation does not in itself mean that he has sustained legal injury of a kind that would entitle him to judicial relief. It is well settled that a person claiming damages as the result of the statutory violation of another is not entitled to recover unless he can show that he belongs to the particular class for whose protection the statute was enacted and that the injury sustained is of a kind that the statute was de-

signed to prevent.[1] Whether a competing retailer is a "person damaged thereby"[2] within the meaning of the Fair Trade Act and the McGuire Act depends upon "the mischief to be corrected and the end to be attained" by that statute.[3]

We submit that such a competing non-signing retailer is not a member of the particular class for whose protection this legislation was enacted and that his loss of business due to price cutting is not the kind of injury that this statute was designed to prevent. The judicially recognized purpose of Fair Trade legislation is to protect a manufacturer or supplier from injury to the good will inherent in his trade mark or brand name, not to protect a competitor from loss of business due to price competition. This has been the rationale on which state Fair Trade Acts have been sustained since this court's decision in *Old Dearborn* v. *Seagram Distillers Corp.*, 299 U.S. 183.[4] In that case, this court held that "the essence of the statutory violation consists not in the bare disposition of the commodity, but in a forbidden use of the trade mark, brand, or name in accomplishing such disposition." 299 U.S. 183, 193. The statute was upheld because:

> "The primary aim of the law is to protect the property—namely the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end and not as an end in itself." *Ibid.*

In concluding its opinion, the court held that it did not have to consider the constitutional doubts that would have

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[1] *Cf. St. Louis R. Co.* v. *Conarty*, 238 U.S. 243, *Texas & Pac. R. Co.* v. *Rigsby*, 241 U.S. 33, *Peigh* v. *B. & O. R. Co.*, 204 F. 2d 391 (D.C. Cir., 1953).

[2] Article 83, § 107 Maryland Code, (*infra*, p. 21a), 15 U.S.C. § 45(a)(3), (*infra*, p. 22a).

[3] *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 124, *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251, 259.

[4] See also *Pep Boys* v. *Pyroil Sales Co.*, 299 U.S. 198.

been raised if the statute were construed as price fixing legislation since "the sole purpose of the present law is to afford a legitimate remedy for an injury to the good will which results from the use of trade marks, brands, or names . . ." 299 U.S. 183, 198.

The non-signer clause of the Maryland statute involved in this case is identical to that construed by this court in *Old Dearborn*. It provides that a violation of the Act is "unfair competition and is actionable at the suit of any person damaged thereby." In sustaining the constitutionality of that statute, the Maryland Court of Appeals held that it was the "assault upon the good will" that constitutes "what the statute denominates as unfair competition." *Schill* v. *Remington Putnam Book Co.*, 179 Md. 83, 90, 17 A. 2d 175, 179 (1941). See also *Bissell Carpet Sweeper Co.* v. *Masters*, 240 F. 2d 684, 687 (4th Cir., 1957).[5]

It may be true that retailer groups were primarily instrumental in obtaining the enactment of Fair Trade laws and that the retailer in his own mind regards himself as the beneficiary of such legislation. Nevertheless, under the theory on which the constitutionality of this legislation was sustained, the class which these laws are designed to protect is the owner of the good will in the trade name, and the evil aimed at is injury to that good will. Under these decisions, such damage as a non-signing retailer suffers by virtue of his competitor's price cutting is *damnum absque injuria*.[6]

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[5] In *Bissell Carpet Sweeper Co.* v. *Masters*, *supra*, the Court of Appeals for the Fourth Circuit held that the Maryland Fair Trade Act must be construed strictly because it was in derogation of the Maryland common law principle that a person has the right to sell his property at any price that he and the purchaser may agree on and that the courts should not infer that the legislature intended to change the common law principle beyond what the Act explicitly provides.

[6] *Cf. Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 479, *Tennessee Power Co.* v. *T.V.A.*, 306 U. S. 118, 140.

**b. The McGuire Act.**

In enacting the enabling legislation of the Miller-Tydings and McGuire Acts, Congress was fully cognizant of this court's decision in *Old Dearborn*, upholding state Fair Trade laws as measures designed to protect good will, and it was for this purpose that the exemption was carved out of the federal antitrust laws. Yet if the decision below remains uncorrected, the inefficient retailer's patronage will replace the producer's good will as the interest to be protected. Such a fundamental change in the policy of the federal antitrust exemption should not be allowed to develop as the result of state court decisions without review by this court.

The court below observed that enforcement-wise, suits by competing retailers are more effective than suits by manufacturers because retailer action "makes it possible to deal in one case with the Fair Trade products of a number of manufacturers." (p. 8a). But whatever economies in disposing of Fair Trade litigation might be effected by this kind of across-the-board dragnet action, this is clearly not the kind of enforcement Congress intended to exempt in the McGuire Act. In *United States* v. *McKesson and Robbins*, 351 U.S. 305, this court held that in the McGuire Act "Congress has marked the limitations beyond which price fixing cannot go," and that the courts "are not only bound by those limitations, but we are bound to construe them strictly since resale price maintenance is a privilege restrictive of a free economy." 351 U.S. 305, 316. *Cf. United States* v. *Masonite*, 316 U.S. 265, 280, *Bissell Carpet Sweeper Co.* v. *Masters, supra*. The mere fact that it would expedite the disposition of Fair Trade litigation to give a non-signing retailer the right to enjoin in a single action, violations of the resale prices of many manufacturers does not permit a state court to exceed those limits.[7]

[7] In discussing the greater efficiencies inherent in retailer enforcement of Fair Trade prices as opposed to the traditional manufacturer's suit, the court below noted that there might be

We submit that the McGuire Act was enacted to permit enforcement of prescribed Fair Trade prices *against* non-signing retailers; not *by* such non-signers. The purpose of extending its requirements to such non-signers was to strengthen the underlying purpose of the Act and the remedy which it provided, *i.e.*, to enable manufacturers and suppliers better to protect the good will in their trade marks or brand names. The Act was not intended to create an entirely new cause of action in a competing retailer for protection from horizontal price competition, a kind of loss which Congress expressly refused to exempt. Congress has been careful to exempt from the antitrust laws only vertical price fixing authorized by agreement between a supplier and his customer. It has expressly excluded from the McGuire exemption, horizontal agreements fixing prices between persons in competition with each other on the same level of trade. 15 U.S.C. § 45(a)(5).

Every attempt to use the Miller-Tydings Act or the McGuire Act as a cloak for horizontal price fixing has been struck down by this court whenever such subterfuge has been brought to its attention. *McKesson and Robbins* v. *United States*, *supra*; *Schwegmann Brothers* v. *Calvert Distillers*, 341 U.S. 384. See also *Melrose Distillers* v. *United States*, 258 F. 2d 726, 730 (4th Cir., 1958) affirmed 359 U.S. 271, *Schill* v. *Remington Putnam Book Co.*, 182 Md. 153, 31 A. 2d 467. This court cannot let stand without review, a construction of state Fair Trade legislation which

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"difficulties" if manufacturers joined in the retailer's suit (p. 9a), citing 69 Harvard L. R. 316. Although the court did not explain the nature of these difficulties in its opinion, the cited article points out that "allowing a manufacturer to aid in obtaining an injunction against price cutting on products of competing manufacturers appears somewhat analogous in effect to horizontal price fixing which is proscribed by the McGuire Act." Note: The Operation of Fair Trade Programs, 69 Harvard L. R. 316, 343. The court below was apparently indifferent, however, to the horizontal price fixing inherent in allowing a retailer to police his competitor's prices.

makes such far-reaching inroads upon federal antitrust policy.

**2. In construing the Fair Trade Act so as to give a non-signing retailer the right to protection from such price cutting by his competitor, whether or not the manufacturer chooses to bring suit, the decision below raises a new question as to the constitutionality of Fair Trade legislation.**

The second *Schwegmann* case[8] sustained the constitutionality of Fair Trade under the McGuire Act as enforced by the manufacturer because neither the District Court nor the Court of Appeals would repudiate the premise of the *Old Dearborn* case, *supra* p. 6, that the manufacturer's interest in the good will of his product justified his controlling the price at which it was resold.

The District Court in that case conceded "that if we were to assume that the merchandise in question was fully owned by the defendants without any residual right inhering in the plaintiff" [manufacturer], the Fair Trade Act would clearly be unconstitutional as a "delegation to private persons of the uncontrolled and unappealable right to fix the prices of merchandise owned by another . . ." *Eli Lilly & Co.* v. *Schwegmann*, 109 F. Supp. 269, 271. The District Judge held, however, that on the record in this case, he could not make such an assumption in view of this court's decision in the *Old Dearborn* case.[9]

The Court of Appeals in second *Schwegmann* affirmed the District Court's decision, refusing to hold the Act uncon-

[8] *Schwegmann Brothers* v. *Eli Lilly & Co.*, 205 F. 2d 788 (5th Cir., 1953), affirming 109 F. Supp. 269 (E.D. La., 1953).

[9] But *n. b.* the District Court's suggestion that "after twenty years of experience under state Fair Trade Acts, the Supreme Court may conclude that the purpose of these Acts is not to protect the good will of a manufacturer, and that price fixing under these acts is not an appropriate means to that perfectly legitimate end, but is in fact an end in itself." 109 F. Supp. 269, 271. See also Dissenting Opinion of Judge Holmes in the Court of Appeals, 205 F. 2d 788, 793.

stitutional as it was there applied. The Fifth Circuit noted the appellant's objection that "Fair Trade laws could not constitutionally require non-signers to observe minimum prices without the participation of the trade-mark or brand owner;" but it refused to consider the point because it was "addressed to a hypothetical case." 205 F. 2d 788, 792. It held that the decision of that question should await the clarification and construction of the statute by the state courts.[10] This court in denying certiorari, presumably agreed that *Schwegmann* v. *Lilly* was not the case in which to decide this constitutional objection, 346 U.S. 856.

The issue is no longer hypothetical, however. It is raised by this appeal. The rationale of *Old Dearborn* clearly does not fit the facts of this case. Here the manufacturers and owners of the good will in the subject of the allegedly unlawful sale refused to bring suit. The plaintiff here, a non-signing retailer, had no conceivable interest in the property sold by the defendants and no legitimate interest in policing the price which his competitors charged for that property. As here applied and enforced, the Fair Trade Act does not merely authorize a manufacturer to set the price for his own property (or any rights in that property) after it leaves his hands. As the statute was construed below, the legislature has delegated the power to fix the price which a competing retailer, with no interest whatever in the property, can compel the owner to maintain.

Unlike the legislation sustained in *Nebbia* v. *New York* and the decisions following therefrom,[11] such a delegation of legislative power is not subject to any procedural safeguard or any standard of fairness or reasonableness. This case therefore presents a clear question of depriva-

[10] *Nebbia* v. *New York*, 291 U.S. 502. *Cf. Olsen* v. *Nebraska*, 313 U.S. 236 and *Yakus* v. *United States*, 321 U.S. 414.

[11] See Comment, Fair Trade and Horizontal Price Fixing: Their Status Since *Second Schwegmann Case*, 63 Yale L. J. 538, 543.

tion of a retailer's rights to his own property without due process. *State of Washington* v. *Roberge*, 278 U.S. 116, 122, *Eubank* v. *Richmond*, 226 U.S. 137, 143, *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495. As stated by this court: "This is legislative delegation in its most obnoxious form; . . . since in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and *especially of a competitor*. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311. (Emphais supplied).

## CONCLUSION

In terms of both its legal and its economic implications, the constitutionality of retailer enforcement of Fair Trade legislation is one of the major unresolved issues before the courts. We submit that this court should take the opportunity presented by this new application of the Maryland Act, for deciding the issue now and preventing the error below from being compounded in future decisions of state and federal courts. For the foregoing reasons, probable jurisdiction should be noted and the case should be set down for argument.

Respectfully submitted,

Milton M. Gottesman
Wyatt Building
Washington 5, D. C.
*Attorney for Appellants*

*Of Counsel:*

J. E. Rindeman
Wyatt Building
Washington 5, D. C.

William B. Kempton
Barton, Wilmer, Bramble & Penniman
806 Mercantile Trust Building
Baltimore 2, Maryland

## APPENDIX A

## THE OPINIONS BELOW

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### Opinion of the Court of Appeals of Maryland.

(Filed May 13, 1960)

No. 193, September Term, 1960

Ellis Gadol and Selma Gadol, co-partners doing business as Four Corners Pharmacy,

v.

Dart Drug Corporation of Maryland and Peoples Service Drug Stores, Inc.

Brune, C. J.:

In this Fair Trade Act case the complainants-appellants, Ellis and Selma Gadol, are the proprietors of the Four Corners Pharmacy, which is on the outskirts of Silver Spring in Montgomery County, and the respondents-appellees, Dart Drug Corporation of Maryland (Dart) and Peoples Service Drug Stores, Inc. (Peoples), each own and operate another drugstore in the vicinity. Silver Spring is in the area which is suburban to Washington, D. C., and there is no Fair Trade Act in the District of Columbia. Dart owns one other drugstore, at Bethesda, also in the Washington suburban area. Peoples' store in direct competition with the Gadols is one of a chain of drugstores operating in and around Washington. The Gadols brought this suit in the Circuit Court for Montgomery County for injunctive relief, both

temporay and permanent, to restrain Dart and Peoples from advertising and selling the products of four named manufacturers at less than the minimum retail resale prices fixed by those manufacturers under the Maryland Fair Trade Act (Code (1957), Art 83, § § 102-110, the "Fair Trade Act" or the "Act"). An interlocutory injunction was issued by the late Judge Reeves on July 28, 1958. Following a hearing more than a year later, an order dissolving the interlocutory injunction, dismissing the bill and thereby denying a permanent injunction, was entered by Judge Pugh on November 12, 1959. The Gadols appeal from that order.

This appeal turns upon whether or not there has been reasonable diligence on the part of the manufacturers to enforce adherence to their Fair Trade prices. Judge Pugh held that there had not been, and he dismissed the bill. There was no denial—on the contrary it was admitted—that the respondents had advertised and made sales at less than the manufacturers' Fair Trade prices. The defense was that the complainants were barred by lack of diligence of the four manufacturers in enforcing compliance with such prices, and hence that no valid Fair Trade prices were in existence, and action against these respondents is claimed to be discriminatory.

The four manufacturers whose products are involved are Johnson & Johnson, Bristol-Myers Company, Mead-Johnson Company, and Miles Laboratories, Inc. Each of them has taken appropriate steps to establish Fair Trade prices, and there seems to be no question that each has given adequate notice to the trade of those prices and of changes from time to time made therein. Their respective usual Fair Trade enforcement procedures and policies, as shown by the evidence, may be summarized as follows:

Johnson & Johnson. Notice of violations is received from their own salesmen, competitors, a local pharmaceu-

tical association or a Fair Trade Service Bureau. Upon receipt of a complaint, a salesman will call upon the alleged violator and request that he raise his prices to the established minimum. If this fails, a letter is sent to the violator from the company's home offices. Thereafter a salesman will follow up the letter to see whether compliance has been obtained. Professional shoppers are sometimes employed. If compliance is not obtained, the company's counsel sends a registered letter to the violator. If all of these efforts fail, counsel would be employed to bring suit, but suit would be brought only if negotiations failed.

Bristol-Myers Company. Violations are reported by salesmen or competitors. Violators are notified by registered letter, and this is followed up by a visit from a salesman. If compliance is not obtained, a professional shopper makes three separate shoppings; and if violations still continue, the evidence is turned over to local counsel with instructions to sue.

Mead-Johnson Company. Violations are reported by salesmen and competitors. Salesmen are instructed to watch advertisements in newspapers. After a violation is reported a warning letter is sent to the alleged violator and shoppings are made to check compliance. If compliance is not obtained, a second warning letter is sent; and if this is ineffective the matter is referred to the home office.

Miles Laboratories, Inc. Notice of violation is received from salesmen or competitors, and a letter is written to the alleged violator. If there is no correction, a visit by a salesman or by counsel, who is also an assistant secretary of the company, follows. If violations continued, suit would be filed.

The implementation of the manufacturers' procedures and policies in Maryland in general and in the Washington suburban area in particular may be thus summarized:

Johnson & Johnson. Ten instances were cited where the above procedures resulted in compliance. No suits had to be brought. The situation in Maryland was complicated by the giving of trading stamps by a number of dealers. Johnson & Johnson amended their contracts and prices to meet this by permitting a 3% merchandising allowance. Action had been deferred on this matter pending decision in the case of *Dart Drug Corp.* v. *Lilly*, 216 Md. 20, 139 A. 2d 272 (decided March 3, 1958). Johnson & Johnson has had no problem with Drug Mart, another dealer in the Washington suburban area, since July, 1958. Dart and Peoples were visited several times and Johnson & Johnson was on the point of suing Dart when this suit was filed.

Bristol-Myers Company. Testimony as to this company was limited to the year 1958 and thereafter. In 1958 the Company was notified of violations by Dart and Peoples and perhaps by one or two others. In September, 1958, Bristol-Myers had sixty-four retail outlets shopped for five of its products, and ten violations were reported. Seven were thought to have been inadvertent; all of these violations were corrected within two weeks as a result of salesmen's visits. At the time of the trial in November, 1959, a staff attorney for Bristol-Myers testified that since an investigation of the Company's enforcement policy in 1958 his Company had notice of only six violators. Three violators in Maryland, two of them in the Washington suburban area, were reported in the six months preceding the trial. Two of the three offenders ceased violations promptly after notification. The case against the third was turned over to Maryland counsel for action and suit was filed in September, 1959. Bristol-Myers has probably several thousand outlets in Maryland. It had contemplated suit against Dart and Peoples when this suit was brought.

Mead-Johnson Company. Suit was brought by Mead-Johnson in the United States District Court for the Dis-

trict of Maryland against Dart. The case did not come to trial because of the pendency of another case involving several questions, among them the effect of giving trading stamps. This other suit was originally filed in the Federal Court but was refiled in a State Court in Baltimore. The plaintiff drug manufacturer in that case is not one of the four manufacturers whose products are involved here. In several instances, compliance has been obtained without litigation. One such instance involved a People Drug store at College Park, in Prince Georges County.

Miles Laboratories. Suits were brought by this corporation in the Federal Court at Baltimore against Dart and Peoples in December, 1957. They have not come to trial and have been held under a stay order for the same reason that the Mead-Johnson suit against Dart has not yet come up.

About two weeks after the determination of the instant suit in the Circuit Court for Montgomery County Johnson & Johnson brought suit against Dart in the Federal Court at Baltimore, and on January 19, 1960, Judge Watkins filed an opinion holding that the plaintiff was entitled to a preliminary injunction. See The Daily Record (Baltimore), January 29, 1960. Judge Watkins was, of course, informed of Judge Pugh's decision in the instant case. He accepted it (unless reversed by this Court) as a binding determination that as of November 10, 1959, Johnson & Johnson's enforcement of its Fair Trade prices had not been sufficiently diligent, but he found that as of the time of the hearing before him on January 18, 1960, it was sufficiently diligent. He noted various actions taken by Johnson & Johnson during the interim to enforce compliance, including (but not in this exact order): (i) demands made upon Dart; (ii) meetings of Johnson & Johnson's local representatives, at which they were instructed to call upon the trade and give notice of Johnson & Johnson's intention to enforce Fair Trade prices, and

were also instructed to increase thier efforts to detect violations; (iii) the sending of notices to some 1425 known retailers in Maryland; (iv) the employment of a detective agency as shoppers to check up on possible violations; (v) a conference with the Prince Georges-Montgomery Pharmaceutical Association; (vi) a conference with the executive vice president of Peoples. At this last conference Peoples indicated a preference for Fair Trade and a willingness to comply, if competitors were prevented from price cutting. Johnson & Johnson had also sued a dealer at Dundalk (in the Baltimore suburban area), and on the day of the hearing expressed its intention to sue another in Montgomery County. This suit was filed the next day, the date of Judge Watkins' opinion.

Judge Watkins' opinion also pointed out that five Fair Trade cases on the docket of the Federal Court had been temporarily stayed, with the right to any party to request the Court to lift the stay at any time, pending the determination of similar cases in the Courts of Baltimore City, particularly cases involving questions arising from the giving of trading stamps or cash register receipts.

Of course, the evidence of the above recent activity by Johnson & Johnson was not before Judge Pugh and cannot affect our decision as to whether or not his order here involved should be affirmed or reversed. It does point up the fact that more could have been done by Johnson & Johnson and by the other three manufacturers than was done; but that is not determinative of the case. The question is whether enough has been done, that is, whether or not there has been reasonable diligence by the manufacturers in the enforcement of their Fair Trade prices. *Hutzler Bros. Co.* v. *Remington Putnam*, 186 Md. 210, 46 A. 2d 101; *Dart Drug Corp.* v. *Lilly, supra*, 216 Md. 20, 139 A. 2d 272; *General Electric Co.* v. *Home Utilities Co.*, 131 F. Supp. 838 (D.C., Md.), affd. 227 F. 2d 384 (C.A., 4th).

The respondents rely heavily on voluminous newspaper advertisements by the drugstores and other stores in the Maryland area suburban to Washington offering products of the four manufacturers at less than Fair Trade prices and on numerous purchases by persons employed as shoppers made at various stores in the Washington suburban area at less than Fair Trade prices. (Some of the affidavits of shoppers show that some negotiating was done to obtain such lower prices.) The respondents contend with a good deal of force that it would not have imposed any great burden on the manufacturers to learn of such advertisements and to take policing action based thereon.

There seems to be little doubt that two factors have militated against the most aggressive enforcement of Fair Trade prices in this case. One is the proximity of the Washington suburban area to the District of Columbia which has no Fair Trade Act. The other is the uncertainty relating to the effect of giving trading stamps or the making of similar allowances, which is a bone of contention in other cases now pending and above referred to. (Of the four manufacturers here involved only one, so far as the record shows, has moved to solve this problem by amending its contract.) The giving of trading stamps in some stores was mentioned in *Dart Drug Corp.* v. *Lilly*, *supra*, but that case did not adjudicate the effect thereof. The opinion noted that there had been some question as to whether the giving of trading stamps constituted a violation of Fair Trade contracts, that courts had disagreed on the question, that the parties to that case then conceded that it did constitute a violation, and that the widespread use of these stamps was a comparatively recent development.

The learned trial judge in the present case adopted flatly the view that because of the proximity of the Washington suburban area to the non-Fair Trade area of the District of Columbia the "manufacturers are duty bound to be more alert and aggressive than in other parts of the State

of Maryland." No authority is cited in support of this statement.

A practical view quite at variance with it is expressed in a note entitled *The Operation of Fair Trade Programs*, 69 Harv. L. Rev. 316, in which (at p. 326) the authors state: "In contrast to the comparative ease of enforcement in rural regions, enforcement is practically impossible in areas contiguous to nonfair-trade states or the District of Columbia. Since consumers can readily travel to the non-fair-trade area to make purchases, dealers in the fair-trade area are under pressure to meet the cut prices. In such a situation, rigid enforcement of the fair-trade price would only deprive retailers in the fair-trade area of a great deal of business." We find it difficult to adopt either of the conflicting views dogmatically, though the proximity of a non-Fair Trade area is, we think, a factor to be considered in determining the question of reasonable diligence. For the manufacturer who wishes to enforce Fair Trade prices the proximity of such an area neither excuses throwing in the sponge nor demands the impossible in efforts or results.

The manufacturers whose products are involved in this case were certainly not overzealous in policing prices in the Washington suburban area in Maryland or in bringing suits to maintain their Fair Trade prices for some months prior to the institution of this suit, and they appear to have been well satisfied to let the Gadols take the initiative. Indeed, Mr. Gadol's testimony indicates that the complainants brought this suit themselves because the manufacturers would not bring suit. On the other hand, it is a fair inference from the record that the Gadols have had rather full cooperation from these manufacturers, at least in assembling and presenting the evidence, in this case. It is also true, as pointed out in the above note in 69 Harv. L. Rev. (at p. 343) that a suit by a retailer makes it possible to deal in one case with the Fair Trade products of several

manufacturers. This note also suggests difficulties which might be encountered if one or more manufacturers joined in such a suit. It should also be borne in mind that for over a year before the hearing of this case on the application for a permanent injunction, these respondents, who had been two of the most active price cutters in the area, were under the restraint of the temporary injunction, and that Dart was once fined for contempt for violation thereof while it was in force.

The actual enforcement procedures of the four manufacturers, at least up to the point of bringing suits, although varying somewhat as between themselves, followed much the same pattern as was involved and held sufficient in *Hutzler Bros. Co.* v. *Remington Putnam, supra; Donner* v. *Calvert Distillers Corp.*, 196 Md. 475, 77 A. 2d 305; and in *Dart Drug Corp* v. *Lilly, supra.* In the last case the manufacturer's procedure was thus summarized. "It was shown that Lilly relies largely, in its enforcement program, upon complaints received from local druggists in active competition with an alleged violator, and complaints received from several active druggists' associations. It also instructs its salesmen, of whom there are 18 in the State, to report violations observed. Upon receiving a complaint, it was shown that the practice was to have the district manager or a salesman investigate and talk to the offender. If this is not successful, the manager of the legal department sends a registered letter of warning. If Necessary, this is followed by the institution of suit" (216 Md. at 24).

Similar procedures were also held to show reasonable diligence in such cases in other courts as: *General Electric Co.* v. *Home Utilities Co., supra*; *Eastman Kodak Co.* v. *Home Utilities Co.*, 138 F. Supp. 670 (D.C., Md.), affd. 234 F. 2d 766 (C.A. 4th); *Lionel Corp.* v. *Klein*, 114 A. 2d 652 (Del. Ch.); *General Electric Co.* v. *R. H. Macy & Co.*, 103 N.Y.S. 2d 440, 199 Misc. 87, app. dis. (voluntary order of appellant followed by court order of dismissal as moot)

278 App. Div. 939, 940, 105 N.Y.S. 2d 1003; *General Electric Co.* v. *Klein-on-the-Square, Inc.*, 121 N.Y.S. 2d 37 (N.Y. Sup. Ct.). See also note, 69 Harv. L. Rev., above cited, pp. 335-336. *Contra* to cases above cited, on facts almost identical with those in the *General Electric Co.* v. *Klein-on-the-Square, Inc.*, is *General Electric Co.* v. *Federated Dept. Stores, Inc.*, C.C.H. Trade Reg. Rep. (1955 Trade Cas.) Par. 68098 (E.D., Wis.).

It is settled that a manufacturer need not sue all violators of his Fair Trade prices in order to show reasonable diligence. *Hutzler Bros. Co.* v. *Remington Putnam; Donner* v. *Calvert Distillers Corp.; General Electric Co.* v. *R. H. Macy & Co.;* all above cited.

The evidence, we think, shows that, on the whole, the four manufacturers were successful, both in the general trading area here involved and in the State of Maryland as a whole (cf. *Dart Drug Corp.* v. *Lilly, supra*), in obtaining compliance without resort to litigation in cases in which they received complaints of violations. Their alleged lack of diligence rests largely on their failure to do more to police prices and on their failure to bring suits. We think, however, that the action which we have already outlined, which they did take and its general efficacy in obtaining compliance in cases of reported violations was, in the light of existing circumstances, sufficient to show reasonable diligence in enforcement, notwithstanding the fact that these manufacturers failed to take some action which they well might have taken (such as that, largely by way of intensification, which Johnson & Johnson has in fact taken since the decision of this case by the Circuit Court). Existing doubts as to the effect of giving trading stamps or the like, the pendency of *Dart Drug Corp.* v. *Lilly, supra*, the pendency of other cases which directly involve the question of giving trading stamps and the like, and the pendency of this very case, with its long outstanding temporary injunction, afforded, we think, reasonable grounds for these manufacturers not being more aggressive in enforcement during

the year or more preceding the filing of this suit and during the year and more of its pendency. We conclude that despite their temporary lack of aggressiveness, there was sufficient effort, and successful effort, in accordance with established patterns of enforcement as to negate a waiver or abandonment of Fair Trade prices on their part, or such lack of diligence as would bar relief. In so holding, we assume, and it has not been otherwise contended, that the complainant retailers stand in no better position on the question of reasonable diligence than do the manufacturers.

There is little, if any, dispute with regard to the facts of the case. What constitutes reasonable diligence is, we think, a mixed question of fact and law. We are not unmindful of Rule 886 a of the Maryland Rules, which provides that where a case has been tried by the lower court without a jury, this Court will review the case both upon the law and the evidence, but that the judgment (which includes an order or decree) of the lower court will not be set aside on the evidence unless clearly erroneous, and that due regard will be given to the opportunity of the lower court to judge the credibility of the witnesses. That opportunity is not involved here, since there is no real conflict in the evidence. In this case we think that the Chancellor drew an erroneous legal conclusion from the evidence before him as to what constituted reasonable diligence and that the order of dismissal should therefore be reversed.

The case will, therefore, be remanded for further proceedings and for the entry of a decree not inconsistent with this opinion. Such a decree should provide for the issuance of a permanent injunction. It might also expressly grant to the respondents leave to apply for its dissolution, in whole or in part at any time if the manufacturers, or any of them, should cease to exercise reasonable diligence to enforce their respective Fair Trade prices in the trading area where the respondents and the complainants are in competition. (The rights of the complainant retailers to relief under the Fair Trade Act would not seem to extend

beyond such an area.) In a number of cases injunctions have been granted subject to conditions as to more intensive or extensive enforcement of Fair Trade prices. See *General Electric Co.* v. *R. H. Macy & Co., supra; Colgate-Palmolive Co.* v. *Max Dichter & Sons, Inc.*, 142 F. Supp. 545 (D.C. Mass.); *Fishman* v. *Kaye*, C.C.H. Trade Reg. Rep. (1950-51 Trade Cas.) Par. 62718 (N.J. Super. Ct.); *Seagram-Distillers Corp.* v. *New Cut Rate Liquors, Inc.*, on temporary injunction, 221 F. 2d 815 (C.A., 7th), reversed on permanent injunction for lack of jurisdiction, 245 F. 2d 453 (C.A., 7th).

*Order Reversed and Case Remanded for Further Proceedings and the Entry of a Decree Not Inconsistent With This Opinion; Costs to be Paid by the Appellees.*

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**Opinion and Order of the Circuit Court for Montgomery County**

(Filed November 12, 1959)

JAMES H. PUGH, *Judge*

This case comes before the Court on the Bill of Complaint of Ellis Gadol and Selma G. Gadol, local druggists doing business in Montgomery County, Maryland, against two other drug stores, Dart Drug Corporation of Maryland and Peoples Service Drug Stores, Inc., under the Fair Trade Act of Maryland, Article 83, Sections 102 through 110 of the 1957 Code of Laws of Maryland. The plaintiffs claim that the defendants have wilfully and knowingly advertised and offered for sale certain drug store merchandise at less than the minimum retail re-sale prices established by contract under the Fair Trade Law of Maryland of four manufacturers, namely, Miles Laboratories, Inc., Bristol Myers Company, Mead Johnson and Johnson & Johnson. Each of these companies have agreements in force in Maryland in which the minimum re-sale prices of their drug store merchandise is established.

These prices vary from time to time, and the manufacturers contend that they send notices to all retailers showing these changes. The plaintiffs are non-signers of these agreements and they bring this suit specifically under that part of Section 107 of Article 83 of the Code which states that violations are "actionable at the suit of any person damaged thereby."

The defendants admit that they have been advertising, offering for sale and selling the items which the plaintiffs allege were offered, advertised and sold below the retail fair trade minimum but the defendants claim, as their defense, that the plaintiffs (who stand in the "shoes" of the manufacturers) have failed to make reasonably diligent effort to enforce their fair trade contracts and therefore such prices have been abandoned. The evidence in this case is very voluminous and it will serve no useful purpose for the Court to incorporate much of it in this opinion.

The rule of law upon which the Court must decide this case is set forth in the case of Hutzler Bros. v. Remington Putnam, 186 Md. 210 at page 216, when the Court of Appeals said: "* * * We hold that a retailer of a copyrighted book cannot take advantage of an alleged breach of a fair trade agreement by others as a defense to a suit against him, unless the violations indicate improper discrimination of unfair business practices, or an acquiesence in the unlawful cutting of prices, or a waiver or abandonment of rights acquired under the statute. In bringing a suit for injunction against a violator of such an agreement, it is sufficient if the complainant has exercised reasonable diligence to prevent price cutting by other violators."

However, in the case of *Dart Drug* v. *Lilly*, 216 Md. 20, the Court of Appeals further said: "* * * The difficulty lies in determining what is reasonable diligence under the circumstances of a particular case." The question of

reasonable diligence is very different in Montgomery and Prince Georges Counties because of the close proximity to the District of Columbia where there is no Fair Trade law. The manufacturers in this case know this, and they are also aware of the fact that there are many discount drug stores in the District of Columbia, just over the Maryland-District Line, all of whom are selling their merchandise far below the prices established by these manufacturers under their Fair Trade contracts in Maryland. Therefore, such manufacturers are duty bound to be more alert and aggressive than in other parts of the State of Maryland. The evidence in this case shows that the manufacturers have been passive and indifferent toward enforcement in this area. (a) The many advertisements and sales by other competitors of the defendants in this area show most emphatically that they do not feel that they are even required to read the advertisements of their merchandise by other druggists in the daily newspapers, which advertisements show continuous violations of their fair trade prices. (b) A witness for one manufacturer admitted that he didn't have time to read the newspapers circulated in the suburbs of Maryland in order to keep up with violations of his company's contracts, further admitting that his company was understaffed. One of the plaintiffs himself testified he became "disgusted" with the enforcement program of these same manufacturers. He also testified that he was always asking the representatives of these manufacturers to take steps to prevent price cutting and after the failure of the manufacturer to stop the price cutting, he filed this suit.

A Court of Equity is a Court of conscience and injunctions are issued by it in clear cases. The continued delays in taking action to prevent price cutting can only lead to one result, the eventual bankruptcy of the independent drug store. The Court does not believe that these four manufacturers have acted with reasonable diligence. If they had, the plaintiffs would not have filed this suit,

they would have done so themselves. The manufacturers are saying that they have acted with "reasonable diligence" because several suits are now pending in the United States District Court in Baltimore and one in the State Court in Baltimore City. In none of these cases has the Court issued an interlocutory injunction, yet the cases have been pending as long as two years and some for three years. This Court is not finding fault with the other Courts nor is it blaming them for the delays in bringing the cases to trial, or the failure of either to issue an interlocutory injunction. Delays can very easily be caused by the litigants, not the Courts, but the fact is that these delays permit the defendants in those cases and others to continue to violate fair trade prices, to the loss, injury and possible bankruptcy of others who are abiding by the prices established by the agreements. This situation is doubly serious and injurious to drug stores in the Metropolitan Area of Montgomery and Prince Georges County, Maryland, because there is no fair trade law in the District of Columbia. Therefore, delays in enforcement with no injunctions issued, defeat the very purpose of the fair trade law, which was enacted to protect, rather than destroy business. There is no evidence in this case that any other non-signer has brought suit or taken any action to prevent price cutting or advertising merchandise below the fair trade minimum, although all non-signers may bring a suit under the Act if damaged thereby. Article 83, Section 107, Code. It is therefore apparent that non-signers have relied upon the manufacturers to compel compliance with their agreements. The non-signers have only themselves to blame if the manufacturers do not "exercise reasonable diligence" to prevent price cutting or advertising below the fair trade minimum. Fair trade laws were intended also to protect manufacturers, in their trade marks and copyrights. If manufacturers desire to protect their trade marks and copyrights, they should act promptly and pursue their rights vigorously. There seems to be a "don't care" at-

titude on the part of these manufacturers and an over anxious tendency to try to avoid litigation, a tendency to "play along" with the violator. This attitude is too passive. In a fast changing world, time for discussion, in the face of a clear violation of fair trade agreements, should be short and action should be prompt and deliberate, otherwise some will take advantage of the delay to the detriment and injury of others. Often prolonged discussions and a desire to compromise on the part of the manufacturer, are taken advantage of, and then after much delay, a law suit is filed. The filing of a law suit is not enough. Such law suits should be prosecuted vigorously, promptly and with as little delay as possible. While these law suits are pending, others are injured. This Court agrees with the principles set forth in the case of *General Electric Co.* v. *Macy*, 103 N.Y.S. (2) 440 when it said at page 452:

> "* * * While this court will not attempt to set forth in detail the requirements of a satisfactory future enforcement program, or a program generally to entitle a plaintiff to the protection of the Fair Trade Law, certain basic essentials are emphasized by the facts of this case. General Electric, as any other manufacturer or producer, should:
>
> (1) Keep itself informed as to price cutting activities and other trends generally known in the industry or trade.
>
> (2) Close scrutiny should be kept over prior violators and appropriate action taken where indicated.
>
> (3) Investigate and follow up complaint *vigorously*.
>
> (4) Enforce Fair Trade prices by *repeated* legal action if necessary.
>
> (5) The enforcement program must be a *continuing* and *sustained* one. * * *" (Emphasis supplied)

An Injunction is an extra-ordinary writ. That means, the Court should not issue it except in extra-ordinary

cases and then only when the evidence is clear and unambiguous. In *Fox* v. *Ewers*, 195 Md. 650, at page 657, the Court of Appeals said: "'Nothing is better settled in this state than that the granting or refusing of an injunction rests in the sound discretion of a Court of Equity.'" Also, as stated in *Miller's Equity Procedure*, Section 574, at page 681:

> "• • • The exercise of the power to grant injunctions—characterized as high and extraordinary—is attended with no small danger, both from its summary nature and its liability to abuse. There is no power, the exercise of which requires greater caution, deliberation and sound discretion, or is more dangerous in a doubtful case, than the power to issue an injunction. It has been repeatedly held that the granting or refusing of a writ of injunction is a matter resting in the sound discretion of the Court. It is not a matter ex debito justitiæ, as the application is addressed to the sound conscience of the court, acting upon all the circumstances belonging to each particular case. It ought not to be granted where it would operate oppressively or unjustly. • • • The power to grant injunctions must be exercised with the greatest caution, and applied only in very clear cases."

Courts are required to construe the Fair Trade Act strictly. In the case of *Venable* v. *Engel & Co.*, 193 Md. 544, at page 549, our Court of Appeals said:

> "• • • The Fair Trade Act is in derogation of the general rule of the common law that any person has the right to sell his property at any price that he and the purchaser may agree upon, and the courts should accordingly construe the Act strictly and should not infer that the Legislature intended to change any common-law principle beyond what the Act explicitly provides. • • •"

The evidence in this case shows a passive, lax and indifferent attitude on the part of the manufacturers to compel compliance with their contracts. It does not prove

reasonable diligence on their part. The plaintiffs acknowledge the deficiency in enforcement by the manufacturers. This Court agrees with the plaintiff.

The Court is convinced that it would be an abuse of the sound discretion required of it to issue a permanent injunction on the evidence in this case.

It is for these reasons that the Court will not issue a permanent injunction.

It is, thereupon, this 10th day of November, A.D. 1959, by the Circuit Court for Montgomery County, Maryland, sitting as a Court of Equity, ORDERED, that the Bill of Complaint be, and the same is hereby dismissed, costs to be paid by the Plaintiffs, and it is further ORDERED, that the interlocutory injunction issued on the 29th day of July, A.D. 1958, be, and the same is hereby dissolved.

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## APPENDIX B

### STATUTES INVOLVED

**The Fair Trade Act of Maryland, Article 83 §§ 102-110 of the Code of Laws of Maryland.**

*§ 103. Contracts relating to resale of commodities at minimum price.*

No contract relating to the sale or resale of a commodity which bears, or the label or container which bears, or the vending equipment from which a commodity is sold to consumer bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others, shall be deemed in violation of any law of the State of Maryland by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use at not less than the stipulated minimum price.

*§ 104. Actions violating retail price restrictions.*

For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of §§ 102-110, (except to the extent authorized by the said contract):

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by § 107 of this subtitle shall be available.

§ *105. Who may establish minimum resale price.*

No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of §§ 102-110, by any person other than the owner of the trade-mark, brand or name used in connection with such commodity or a distributor specifically authorized to establish said price by the owner of such trade-mark, brand or name.

§ *106. To what resales contract does not apply.*

No contract containing any of the provisions enumerated in § 103 of this subtitle shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(b) When the goods are altered, secondhand, damaged, defaced or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(c) By any officer acting under an order of court.

§ *107. Advertising or selling at less than contract price is unfair competition.*

Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of §§ 102-110, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair

competition and is actionable at the suit of any person damaged thereby.

*§ 108. To what contracts §§ 102 to 110 inapplicable.*

Sections 102-110 shall not apply to any contract or agreement between or among producers or distributors or, except as provided in subdivision (c) of § 103 of this subtitle, between or among wholesalers, or between or among retailers, as to sale or resale prices.

*§ 109. Severability.*

If any provision of §§ 102-110, or the application thereof to any person or circumstance, is held invalid, the remainder of said sections, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

*§ 110. Short title.*

Sections 102-110 may be known and cited as the "Fair Trade Act".

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**Section 5 of the Federal Trade Commission Act, as Amended. Act of July 14, 1952, Chapter 745, 66 Stat. 632 (McGuire Act) 15 U.S.C. § 45.**

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when

contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

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Office Supreme Court, U.S.
FILED
OCT 20 1960
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

## No. 435

DART DRUG CORPORATION OF MARYLAND, AND PEOPLES SERVICE DRUG STORES, INC.,
*Appellants,*

v.

ELLIS GADOL AND SELMA GADOL, CO-PARTNERS DOING BUSINESS AS FOUR CORNERS PHARMACY,
*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

## MOTION TO DISMISS OR AFFIRM

JOSEPH S. KAUFMAN,
111 N. Charles Street,
Baltimore 1, Maryland,
Attorney for Appellees.

Of Counsel:

BERNARD S. MELNICOVE,
111 N. Charles Street,
Baltimore 1, Maryland,

STEDMAN PRESCOTT, JR.,
Guardian Federal Building,
Silver Spring, Md.

The Daily Record Co., Baltimore 3, Md.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

## No. 435

DART DRUG CORPORATION OF MARYLAND, AND PEOPLES SERVICE DRUG STORES, INC.,
*Appellants,*

v.

ELLIS GADOL AND SELMA GADOL, CO-PARTNERS DOING BUSINESS AS FOUR CORNERS PHARMACY,
*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

## MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss or affirm on the following grounds:

(a) The Federal question sought to be reviewed was not properly raised before or expressly passed upon by the Court of Appeals of Maryland;

(b) This appeal is not within the jurisdiction of this Court because it has not been taken in conformity with statute;

(c) This appeal does not present the question sought to be reviewed or any substantial Federal question.

## STATEMENT

This is an appeal from a decision of the Court of Appeals of Maryland reversing an Order of the Circuit Court for Montgomery County and remanding the cause for further proceedings and the entry of a decree permanently enjoining the Appellants from advertising, offering for sale and selling the products of certain manufacturers at below the Fair Trade prices established by those manufacturers (222 Md. 372, 161 A. 2d 122). The case arose by the filing of a Bill of Complaint by Appellees to enjoin two chain drug stores in direct competition with Appellees from advertising and selling products of the named manufacturers at less than the minimum retail resale prices fixed and established by those manufacturers under the Maryland Fair Trade Act (Article 83, Sections 102-110 of the Annotated Code of Maryland, 1957 Ed.). An Interlocutory Injunction was issued on July 28, 1958 and thereafter on November 12, 1959 an Order was passed dissolving the Interlocutory Injunction and dismissing the Bill and, therefore, denying a permanent injunction. An appeal from the Order of the Circuit Court for Montgomery County was taken to the Court of Appeals of Maryland, which reversed the decision of the lower Court.

## ARGUMENT

### I.

**The Federal Question Sought To Be Reviewed Was Not Properly Raised Below or Expressly Passed Upon By the Court of Appeals of Maryland.**

The Appellants did not raise in their briefs or in oral argument in the Court of Appeals of Maryland the issues now sought to be raised by their Jurisdictional Statement. The opinion of the Court of Appeals clearly shows that the questions now presented to this Court were not before that

Court and therefore, not considered by it (Jurisdictional Statement, Appendix A, p. 2a).

The Appellants in their Jurisdictional Statement (p. 3), state that they admitted advertising and selling the products in question at prices below the retail resale prices set by the manufacturers but defended on two questions:

1. That the manufacturers had failed diligently to enforce contracts under the statute; and

2. The Plaintiff as a retailer in competition with the Appellants had no right to enjoin the alleged price cutting.

The lower Court and the Court of Appeals found that the question involved was whether reasonable diligence on the part of manufacturers to enforce Fair Trade adherence to their prices had been shown. No question was raised as to whether the Appellees as competing retailers had the right to seek an injunction against the Appellants.

In fact, the Appellant, Dart Drug Corporation of Maryland, in its brief in the Court of Appeals of Maryland opened its argument with the following statement (see Brief of Dart Drug Corporation of Maryland in the Court of Appeals of Maryland, p. 9).

> "The appellee Dart does not agree that the questions in this appeal are stated by the appellants. *Neither Peoples nor Dart has ever questioned the right of a retailer who is injured by a violation of the Maryland Fair Trade Act to seek an injunction.* Furthermore, the lower court referred to the authority of the Appellants to bring this suit by stating that they brought the suit under that part of Section 107 of Article 83 of the Code which states that violations are 'actionable at the suit of any person damaged thereby'." (Emphasis supplied.)

After the decision of the Court of Appeals the Appellants filed motions for reargument referring to the language of the Court's opinion and stating, "In view of the action of the Court of Appeals directing a permanent injunction be issued, it is submitted that this matter of damages should be presented to the Court." (Appellant, Dart Drug Corporation of Maryland, Motion for Reargument, paragraph 4.) That on June 29, 1960, the Court of Appeals passed an Order denying the Motion for Reargument.

Upon the aforegoing facts, it is beyond doubt that the question sought to be reviewed is not now before this Court. The Maryland Court of Appeals like most other appellate courts, has consistently and uniformly held that any contentions not briefed in that Court may be deemed abandoned and need not be considered by the Court of Appeals.[1]

As was said in *John v. Paullin*, 231 U.S. 583, 585:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appeal courts, and the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law."

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[1] *Vestry of Emmanuel Church of Balto. v. Safe Dep. & Tr. Co.*, 169 Md. 28, 37, 179 A. 64; *Tawes v. Aerial Products, Inc.*, 210 Md. 627, 644, 124 A. 2d 805; *Schneider v. Davis*, 194 Md. 316, 71 A. 2d 32; *Holler v. Lowery*, 175 Md. 149, 200 A. 353; *Wolfe v. State, use of Brown*, 173 Md. 103, 194 A. 832; *State v. United Rwys. & Elec. Co.*, 162 Md. 404, 159 A. 916; *Globe Slicing Mach. Co. v. Murphy*, 161 Md. 667, 158 A. 26; *May Co. v. Drury*, 160 Md. 143, 153 A. 61. See also Md. Rules of Procedure, Rule 831, formerly 39 of the Rules and Regulations respecting Appeals to the Court of Appeals of Maryland; *Schroepfer v. A. S. Abell Co.*, 4th C.C.A. 138 F. 2d 111, cert. den. 321 U.S. 763, rehearing den. 322 U.S. 770; 2 Maryland Law Encyclopedia, Appeal and Error, 402, pp. 312-13.

It is well and specifically established that the Court of Appeals' denial, without comment, of appellants' motion for reargument, which attempted to raise a federal question not theretofore before the Court of Appeals, does not constitute a basis for review in this Court, it being presumed that the ruling on the motion was based on State procedural grounds, precluding Supreme Court review.[2]

The instant case affords even less basis for jurisdiction than the cases herein cited since the opinion of the Court of Appeals makes clear that the question now sought to be raised was not before it, and the brief of the Appellant, Dart, expressly stated that, "*. . .* Neither Peoples nor Dart has ever questioned the right of a retailer who is injured by a violation of the Maryland Fair Trade Act to seek an injunction." It is clear that there is nothing for this Court to review.

## II.

## This Case Is Not Within the Appeal Jurisdiction of This Court.

The Appellants herein rely upon the provisions of Title 28, U.S.C. Section 1257(2) and now seek to claim that the

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[2] *Cons. Turnpike Co. v. O.V.R. Co.*, 228 U.S. 326, 333-4; *Forbes v. State Council*, 216 U.S. 396, 399; *McCorquodale v. Texas*, 211 U.S. 432, 436-7. Cf. *Ill. Cent. R. Co. v. Ky.*, 218 U.S. 554; *Pa. R. Co. v. Ill. Brick Co.*, 297 U.S. 447, 462-3; *Erie Co. v. Purdy*, 185 U.S. 148; *Mut. Life Ins. Co. v. McGrew*, 188 U.S. 291, 309. See also, *Bailey v. Anderson*, 326 U.S. 203, 206-7 (Supreme Court assumes where procedural deficiency exists in raising and preserving federal questions in State courts that State court silence on the federal question, unless it can be shown otherwise, is due to procedural deficiency, thus precluding Supreme Court review); *Stembridge v. Ga.*, 343 U.S. 541, 547-8 (where federal question raised for first time in petition for rehearing in intermediate appellate court, highest State court's refusal without opinion to hear case precludes Supreme Court review since Supreme Court is without jurisdiction "when the question of the existence of an adequate State ground is debatable and action of highest State court might have been based on adequate State procedural ground).

appeal involves the constitutionality of the "non-signer clause" of the Maryland Fair Trade Act, supra. The constitutionality or validity of the Maryland Fair Trade Act was neither raised in the proceedings presented to the lower court for decision or presented and ruled upon by the Court of Appeals of Maryland. In the cases cited by the Appellants in the Jurisdictional Statement (p. 2)[3] there was a direct finding upholding the constitutionality and validity of state laws involved by State Courts. In this case no question was raised at any stage of the proceedings. In fact, said question of constitutionality has been sustained by the Maryland Court of Appeals on several prior occasions. See *Goldsmith v. Mead Johnson*, 176 Md. 682 and *Home Utilities Co. v. Revere*, 209 Md. 610.

Before the Circuit Court for Montgomery County the sole defense made was that the manufacturers "have failed to make reasonably diligent efforts to enforce their fair trade contracts and therefor such prices have been abandoned." (Jurisdictional State, Appendix p. 13a). In the Court of Appeals of Maryland there was presented the mixed question of fact and law as to whether reasonable diligence had been shown by the manufacturers involved (See Jurisdictional Statement, Appendix p. 2a). Appellants did not claim at any stage of the proceedings that the enforcement of Fair Trade Contracts by competing retailers would make the Maryland Fair Trade Law void under Federal Law.

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[3] *Winters v. New York*, 333 U.S. 507; *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408.

## III.

**This Appeal Does Not Present the Question Sought To Be Reviewed or Any Substantial Federal Question and It Is Manifest That the Questions On Which the Decision of This Case Depend Are So Unsubstantial As Not To Need Further Argument.**

(a)

THE QUESTIONS SOUGHT TO BE REVIEWED ARE NOT INVOLVED IN THIS CASE.

The elements in the Appellants' claim of Federal rights are that the Appellees being competing retailers are not persons damaged by the admitted predatory price cutting by the Appellants. The Court of Appeals of Maryland in two earlier Fair Trade cases recognized and sanctioned the right of a retailer to bring an action against a competing retailer who was selling fair traded items below the established Fair Trade prices. *Schill v. Remington Putnam Book Co.*, 179 Md. 83 and *Hutzler Co. v. Remington Putnam Book Co.*, 186 Md. 210. The Fair Trade Act itself recognizes the right of a retailer to bring action. Article 83, Section 107 of the Annotated Code of Maryland (1957 Ed.) expressly provides that willfully and knowingly advertising, offering for sale and selling any commodity at less than the prices established in any contract entered into pursuant to the Fair Trade Law is "unfair competition and is actionable upon the suit of any person damaged thereby".[4]

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[4] The rationale for allowing a competing retailer who himself abides by the Fair Trade Contract to bring suit is more succinctly set forth in Callmann, *Unfair Competition and Trade Marks*, Second Edition, Vol. I, Sec. 24.3 as follows: "The gist, however, of the case is not trespass upon property or breach of contract, but unfair competition; and the real plaintiff is not the owner of the good will or the party to a contract, but the competitor of the price-cutting dealer. While under the common law of unfair competition, the competitor is en-

Nowhere in these proceedings was it ever contended that a competing retailer did not have the right to bring this action as being one of those persons damaged by the unfair competition of the Appellants. Likewise, nowhere was there mentioned that this action in any way conflicted with the Anti-Trust Laws of the United States or that the action was in violation of the provisions of the McGuire Act (15 U.S.C. 45).[5]

The Appellants have the audacity to state the proposition that as the statute was construed below, the Legisla-

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titled to sue only as the owner of property interests, the Fair Trade Acts declare the unfair competition of price-cutting actionable at the suit of 'any person damaged thereby.' Herein lies the importance of the Fair Trade Acts, the statutory language of which speaks of unfair competition. 'The one who to a greater degree bears the brunt or burden as a consequence of price-cutting by a retailer is the competing retailer who is observing his contract obligations. Such a retailer suffers proportionately to a greater extent than does the producer. After all, even the price-cutter must directly or indirectly get his goods to sell on the price-cutting basis from the producer, while the retailer who observes his contract obligation is deprived of his sales and his good repute in the neighborhood and is damaged as a consequence of the price-cutting acts of his competitors'. The retailer, distributor, wholesaler or jobber, is entitled to sue not because he has an interest in the good will — not because he has gone to great expense in advertising the trade mark — but merely because he, as a competitor, is likely to suffer damage from the price-cutting, and there can be no doubt that he is a 'person damaged' within the meaning of the Fair Trade Act."

[5] It is expressly provided in the McGuire Act, 15 U.S.C., Section 45, that enforcement of Fair Trade Contracts do not conflict with the provisions of the Federal Trade Commission Acts or the Anti-Trust Acts and sub-section 3 thereof provides as follows: "Nothing contained in this Act or in any of the Anti-trust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, *is unfair competition and is actionable at the suit of any person damaged thereby.*" (Emphasis supplied.)

ture has delegated the power to fix prices to a competing retailer (Jurisdictional Statement, p. 11). The record in this case clearly shows that the Fair Trade prices were fixed by the manufacturers in accordance with the Fair Trade Act. There is no evidence whatsoever that competing retailers established prices. In fact, to the contrary, the uncontradicted testimony shows that the manufacturers had determined the prices to be charged on the trademarked items (Record Extract, p. 161).

(b)

THERE IS NO SUBSTANTIAL FEDERAL QUESTION IN THIS CASE.

Even if this appeal presented the question sought to be reviewed, the question is not substantial. The question as presented does not contend that the decision of the Court of Appeals of Maryland denied the Appellants due process or equal protection of laws. The issues were clearly defined and fully tried, and the question of reasonable diligence was applied in accordance with State law. The Appellants are obviously claiming special exemption from the Maryland Fair Trade Act, so that they can continue to engender unfair competition between themselves and the Appellees. It is perfectly clear that the Appellants seek a special license to violate a law which others are fully complying with and bound by. The facts of this case clearly show unfair competition by the Appellants, the prevention of which has traditionally been handled by the State Courts.

## CONCLUSION

For the aforegoing reasons, it is respectfully submitted that this appeal be dismissed or the decision of the Court of Appeals of Maryland be affirmed and the mandate issue forthwith.

Respectfully submitted,

JOSEPH S. KAUFMAN,
Attorney for Appellees.

Of Counsel:

BERNARD S. MELNICOVE,
STEDMAN PRESCOTT, JR.,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

No. 435

DART DRUG CORPORATION OF MARYLAND, and PEOPLES SERVICE DRUG STORES, INC., *Appellants*,

v.

ELLIS GADOL and SELMA GADOL, co-partners doing business as FOUR CORNERS PHARMACY, *Appellees*.

## APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

MILTON M. GOTTESMAN
Wyatt Building
Washington 5, D. C.
*Attorney for Appellants*

*Of Counsel:*

J. E. BINDEMAN
Wyatt Building
Washington 5, D. C.

WILLIAM B. KEMPTON
BARTON, WILMER, BRAMBLE & PENNIMAN
Mercantile Trust Building
Baltimore 2, Maryland

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## APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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### I. Since the Filing of Their Answer to the Complaint in This Case, the Defendants Have Consistently Maintained that the Plaintiffs Had No Legally Protectable Interest and that Any Application of the Fair Trade Act Which Gave Them Such Protection Would Conflict with the Fourteenth Amendment

In their Motion to Dismiss or Affirm, the Appellees complain that the Appellants "did not raise in their briefs or in oral argument in the Court of Appeals of Maryland the issues now sought to be raised by their Jurisdictional Statement". The Appellees, however, lose sight of the

fact that the Appellants here were not the Appellants in the Maryland Court of Appeals.[1] The trial court, in the exercise of its sound discretion, had denied the injunction sought by the complaint because on the facts as shown, the manufacturers involved had failed to exercise reasonable diligence in enforcing their rights. (Jurisdictional Statement 12a). Appellees are correct, therefore, in recognizing that no federal constitutional question was presented by that nisi prius decision and thus none would have been presented here had it been affirmed on appeal.

It was only when the Maryland Court of Appeals reversed the trial court's denial of the relief sought and directed the entry of an injunction for the protection of the complaining retailer, that the statute for the first time was applied so as to conflict with the Fourteenth Amendment, and this conflict was pointed out in defendants' Motion for Reargument. This was not, however, the first time that this federal constitutional question was raised in this case. The repugnance to the Fourteenth Amendment of the application of the Fair Trade Act sought by the plaintiffs, was interposed as an affirmative defense to this action at its very outset, i.e., in the defendants' respective answers. (R. 15 and R. 19).

The defendants did not contend below, and they do not argue here, that the statute in its entirety offends the federal constitution. They merely challenged the particular application of that Act sought by the Complaint in this case. While the Court of Appeals did not discuss the constitutional question in its opinion or in its order denying defendants' Motions for Reargument, it did affirm the right of a retailer to enforce Fair Trade prices in the

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[1] In the interests of clarity, Appellants here, who were appellees in the Court of Appeals, will be referred to herein as the defendants. The appellees will be referred to as plaintiffs.

face of that challenge to the constitutionality of the Act as so applied.[2]

It is therefore clear that "as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution, . . . the case is rightly here" on appeal. *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U.S. 282, 290. And in *Bryant* v. *Zimmerman*, 278 U.S. 63, 67, this court held: "The decision must have been against the claim of invalidity but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

The appellees complain that no question was raised below "as to whether appellees as competing retailers had the right to seek an injunction against the appellants".[3] Defendants' challenge to the standing of the plaintiff retailer may not have been stated to the Court of Appeals in precisely the same terms as it was presented in their Jurisdictional Statement in this court, but the point was clearly made below. (R. 281-283).

It is true that in the Court of Appeals, the argument was confined to showing that the plaintiff retailer had

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[2] The court denied the defendants' Motions for Reargument without opinion (R. 293); but in granting the defendants a stay to permit them to take this appeal, it rejected the plaintiffs' objection that there was no substantial federal question to be reviewed by this court. (R. 290).

[3] In their brief in the Court of Appeals, the plaintiffs themselves raised the question: "Does a competing retailer who is injured by repeated violations of the Maryland Fair Trade Act have the right to seek an injunction against such unfair competition?" As the plaintiffs correctly note in their instant Motion, we pointed out in response that it was not necessary for the Court of Appeals to decide this legal question since on the facts as found by the trial court, the plaintiffs could not prevail in any event.

not shown any injury resulting from the defendants' violation. The defendants in their argument below did not suggest that a retailer could never show the right to such relief. And we may concede that if, as now alleged by the plaintiff, this case had involved "admitted predatory price cutting" (Motion, p. 7), an injunction to prevent such conduct would have conflicted neither with the federal antitrust laws nor the Fourteenth Amendment. But contrary to the plaintiffs' representation to this court, there was no showing or admission that the defendants' price-cuts were predatory—that they were made for the purpose of injuring the plaintiffs or putting them out of business. The only admission and the only testimony in this case was that the defendants sold their merchandise at prices which they believed would be most profitable for them.

Despite the differences in the phraseology of defendants' argument in the Court of Appeals and their Jurisdictional Statement here, the defendants have consistently maintained that the plaintiffs had no legally protectable interest and that any application of the Fair Trade Act which gave them such protection would conflict with the Fourteenth Amendment. This court has recognized that "there are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in good time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Bryant* v. *Zimmerman*, *supra*, 278 U.S. 63, 67. See also *Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590, 598-599.

**II. The Unprecedented and Unconstitutional Application of the Fair Trade Laws Made by the Decision Below, Should Be Reviewed by This Court**

Appellees also misunderstand the appellants' argument on the merits of this appeal when they suggest that our due process point is premised on an assumption that the Maryland Fair Trade prices were set by the retailers. (Motion, p. 8) Appellants have made no such suggestion. There is no question but that the prices in question were determined in the first instance by the manufacturer in purported compliance with the statute. We do contend, however, that, where, as in this case, the manufacturers perfunctorily establish resale prices, but leave it to competing retailers to determine whether or not these prices are actually observed and enforced, the manufacturer has improperly abdicated his statutory function in favor of the retailer. Until the decision below, neither this court nor the highest court of any state had construed a Fair Trade Act so as to authorize the manufacturer to redelegate to non-signing retailers the price fixing powers which the legislature ostensibly conferred upon him.

That the retail drug industry well recognizes the unprecedented nature of the decision below, is evidenced by the following comment from one of its principal trade publications:

> "It is significant to note that in a retailer-vs.-retailer fair trade suit, the State Court of Appeals ordered a permanent injunction prohibiting Dart Drug and Peoples Drug Stores in Silver Spring, from selling below fair trade prices. *This was the first retailer-vs.-retailer fair trade case to be upheld by the highest court of any state and will probably be regarded as a milestone in the enforcement of fair trade acts.*"[4]

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[4] The Red Book, a 728-page compilation of catalogs and price lists in the drug industry, published by Drug Topics Publishing Co., Inc., page 1. (Emphasis supplied.)

We submit that this decision is a "milestone" which points in the wrong direction and that unless it is corrected now, it will mislead litigants and courts alike into a broadening of the Fair Trade injunction beyond anything which this court, consistent with due process, can condone.

For the foregoing reasons and those set forth in Appellants' Jurisdictional Statement, the appellees' Motion to Dismiss or Affirm should be denied and probable jurisdiction should be noted in this case.

Respectfully submitted,

MILTON M. GOTTESMAN
Wyatt Building
Washington 5, D. C.
*Attorney for Appellants*

*Of Counsel:*

J. E. BINDEMAN
Wyatt Building
Washington 5, D. C.

WILLIAM B. KEMPTON
BARTON, WILMER, BRAMBLE & PENNIMAN
806 Mercantile Trust Building
Baltimore 2, Maryland

Dated: November 7, 1960